IN THE

Supreme Court of the United States

Term, 1976

No. 76-401

CITY OF LAWRENCE, INDIANA, Appellant,

v.

CITY OF INDIANAPOLIS, INDIANA, MARY D. AIKINS, Auditor of the State of Indiana; and LAWRENCE L. BUELL, Treasurer of Marion County, Indiana, for and on behalf of the Department of Transportation of Consolidated First Class City of Indianapolis, Indiana, Appellees.

ON APPEAL FROM THE SUPREME COURT OF INDIANA

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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To the appellees' quoted sentence from *Williams, Receiver of the Washington, Baltimore & Annapolis Railroad Co. v. Mayor and City Council of Baltimore,* (1932) 289 U.S. 36, should be added another rule set forth therein that statutes involving fanciful evil and illusionary injustices and wrongs may be stricken as violating the Fourteenth Amendment to the Federal Constitution. The bankrupt railroad was the only means of transporting mil-

lions of passengers into its largest city. The need for temporary assistance for two years to keep it in operation was of such special and significant public importance to justify the special law, since general laws did not cover it.

The underlying principle, upon analysis, in appellees' cited cases of *Trenton v. New Jersey,* (1922) 262 U.S. 182, 67 L. Ed. 937, 43 S. Ct. 534, and *Newark v. New Jersey,* (1922) 262 U.S. 192, 67 L. Ed. 943, 43 S. Ct. 539, actually supports appellant's position. The statute regulating the use of water and the assessment and collection of fees was part of the powers and authorities of the state in the interests of *all the cities and towns in the state* This included Trenton and Newark, as well. Therefore, they could not invoke federal constitutional restraint against the state from imposing a license fee or charge for diverting water specified in the state law *for use by all of its residents.*

The appellees refer to dictum in *Dartmouth College v. Woodard,* (1819) 4 Wheat. 518, in attempting to convince this Court that municipalities do not have constitutional rights independent of those expressly provided by the state. That court said that even though such legislation under question might be suitable for despotic powers, it cannot prevail anywhere in the United States. It was not only subject to judicial review, but it was stricken.

Appellees' cited case of *Worchester v. Worchester Consol. St. Ry.,* (1905) 196 U.S. 539, 49 L. Ed. 591, 25 S. Ct. 327, held that municipalities are subject to their legislature's control, except where there are restrictions by constitutional prohibitions, both state and federal.

Appellees' cited case of *County Department of Public Welfare v. Potthoff,* (1942) 220 Ind. 574, 44 N.E.2d 494,

also supports the appellant's position. Pursuant to a 1936 statute, a county department of public welfare made an award of old age assistance to an applicant with the understanding such payment became a lien against all of his real property. Upon his death, a claim was filed in his estate to recover the amount paid under the welfare grant. Thereafter, the Indiana State Legislature amended said act by striking out the provisions creating the lien for such old age assistance. Subsequently, a denial of the claim was affirmed because the Supreme Court could not and would not tolerate such an arbitrary classification which authorized old age assistance to be extended after a given date to the members of one group of citizens upon the condition the state retained a lien on their properties while at the same time assistance could be extended to those of a like group with the same inherent needs without such requirement.

At page 498, that case laid down this rule:

> "There is no better means for ascertaining the will and intention of the legislature than that which is afforded by the history of the statute as found in the journals of the two legislative bodies."

The Court then went into the legislative history indicating conclusively the General Assembly had before it, considered it and rejected the propositions presented. Appellant has pointed out this legislative history and its application in its jurisdictional statement; however, the appellees have elected to waive any consideration of this important issue.

Appellant agrees there is no vested right to the cumulative capital improvement cigarette tax distribution fund. Since it was created by the Legislature, it has the power to take it away. However, if this is done, it must affect

all cities and towns in the state and not just the appellant and three other cities and towns who have the same burdens, duties and responsibilities as the favored class.

Even though state legislatures have wide discretionary powers, there comes a point beyond which they may not go without violating the equal protection clause guaranteed by the Fourteenth Amendment to the Federal Constitution, whether it affects municipal corporations or other county units of government or individuals or private corporations.

Allied Stores of Ohio v. Bowers, (1959) 358 U.S. 522;

Ohio Oil Co. v. Conway, (1930) 281 U.S. 146;

Cincinnati H. & D. Ry. Co. v. McCullom, (1915) 183 Ind. 556, 109 N.E. 206, aff'd 245 U.S. 632;

Kraus v. Lehman, (1908) 170 Ind. 408, 83 N.E. 714;

Town of Longview v. City of Crawfordsville, (1905) 164 Ind. 117, 73 N.E. 78;

56 Am. Jur. 2d, *Municipal Corporations, Counties and Other Political Subdivisions,* § 106, p. 164.

It is difficult to imagine how a more substantial federal question could be presented. In construing a per capita revenue sharing type statute, Indiana's highest Courts, in direct violation of direct authority *everywhere,* including it's own, have picked and chosen just certain parts of the statute and left out other controlling parts. In so doing, it created a favored class, who receives large and substantial distributions, and burdens an unfavored class of many thousands of people and involves great sums of their money, who do not receive their shares, when both classes are in like situations and have the same inherent needs. Appellees have refused to address their motion to dismiss

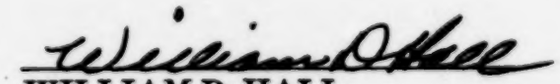
or affirm to this question, properly presented by the appellant in its jurisdictional statement. It is clear they have conceded that appellant's position is sound and the fact that this Court should grant review of this case and reverse the Court of Appeals and the judgment of the Trial Court.

CONCLUSION

The taking of appellant's des' nated distributive share from it and paying it to others, the construction of just part of the controlling statute in violation of clear authority, and the appellees' refusal to come to grips with the questions presented are textbook examples of the need for and the function of the Fourteenth Amendment to the Fderal Constitution. Appellant feels that its needs for turning of this Court for relief are at least as great as others, which are reflected by the long line of decisions granting similar relief. The granting of the relief requested of this Court is as important to the appellant as all the previous ones, and perhaps more so for the reason that if this decision is left stand it will lay the groundwork for the ultimate destruction of the appellant and other cities and the rights of thousands and ultimately millions of people.

This Court should grant a review and reverse the decision and judgment of the Trial Court.

Respectfully submitted,



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